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In The

Supreme Court of the United States

ROBERT STEWART, AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, HENRY MCMASTER, AS ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA AND RALPH HOISINGTON, AS SOLICITOR OF THE NINTH JUDICIAL CIRCUIT,

Petitioners,

vs.

JIMMY MARTIN AND LUCKY STRIKE, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit properly held that *Burford* abstention does not apply to federal constitutional challenges to two South Carolina statutes outlawing devices pertaining to "games of chance" because resolution of these challenges neither requires the court to adjudicate difficult questions of state law, nor disrupts state efforts to establish through a complex regulatory process a coherent policy on a matter of substantial public concern.

DISCLOSURE STATEMENT

Lucky Strike LLC is not a public corporation, but rather is a privately held limited liability corporation under South Carolina law.

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INTRODUCTION

The Petition presents no compelling reason supporting an exercise of this Court's jurisdiction. The Fourth Circuit interpreted and applied *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) abstention principles in accordance with this Court's precedent. Furthermore, Petitioner has not identified any real split of authority within the Circuits. Rather, Petitioner attempts to manufacture such a split by mischaracterizing the Fourth Circuit's ruling.

In an effort to justify this Writ, Petitioner argues that the Fourth Circuit creates an "exception" to *Burford* abstention to facial challenges to legislative enactments. The Fourth Circuit's carefully reasoned opinion creates no new exception to *Burford* abstention. Rather, the Fourth Circuit recognizes that *Burford* abstention is the exception to the federal court's obligation to rule upon cases within its jurisdiction. The Fourth Circuit correctly applied this Court's decisions in *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Zablocki v. Redhail*, 434 U.S. 374 (1978) by concluding that abstention did not apply to Respondents' facial challenges which do not involve interpretation of difficult questions of state law.

COUNTERSTATEMENT OF THE CASE

Respondents commenced an action seeking declaratory and injunctive relief under the authority of *Ex Parte Young*, 209 U.S. 123 (1908) against various South Carolina State Officials charged with enforcing the State's laws outlawing "games of chance" alleging that the challenged statutes violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and that Respondents are being subjected to unconstitutional discriminatory enforcement practices. The District Court believed that the *Burford* doctrine required abstention and dismissed the Complaint.

Respondents appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit reversed and held that Respondents' facial constitutional challenges to the statutes at issue do not turn upon "difficult questions of state law." The Fourth Circuit further concluded that Respondents' claims do not threaten a state interest in uniform regulation that outweighs the federal interest in adjudicating the case. As a result, the Fourth Circuit ruled that *Burford* abstention was not applicable. The Dissent, and Petitioners herein, argue for the creation of a blanket gambling law abstention doctrine which does not exist.

Petitioner's Petition for Rehearing En Banc challenging the correctness of the panel's ruling on the grounds raised to this Court was denied.

REASONS FOR DENYING THE PETITION

I. RESPONDENTS' CLAIMS ARE BASED SOLELY UPON FEDERAL CONSTITUTIONAL CHALLENGES TO SOUTH CAROLINA'S STATUTES AND DO NOT INVOLVE INTERPRETATIONS OF STATE LAW NOR IS THERE ANY STATE ADMINISTRATIVE OR REGULATORY BODY TO WHICH FEDERAL COURTS SHOULD DEFER

Respondents' claims rest primarily on the authority of *Ex Parte Young*, 209 U.S. 123 (1908), which is cited most often for the proposition that the Eleventh Amendment does not bar suits for declaratory and injunctive relief against State officers in their official capacity whose duties are to enforce State law which contravenes the United States Constitution or other federal law. *Ex Parte Young* also ruled that the State cannot impose a condition upon a party interested in obtaining a judicial decision involving a complicated or technical question of fact that, if unsuccessful, the party is subject to criminal punishment.

Ex Parte Young involved a challenge to the State of Minnesota's legislation setting a maximum passenger rate to be charged by railroads in Minnesota. The Act also provided criminal punishment and fines against any railroad company, officer, or agent who charged a rate in excess of the maximum allowed. Furthermore, under the Act being challenged, there was no mechanism in which a railroad company could challenge the sufficiency of the rate. The U.S. Supreme Court determined that the Act denied the

railroad companies' equal protection of the laws and its property was subject to being taken without due process of law because the company was only allowed a hearing on the claim of the unconstitutionality of the Act at risk of being subjected to criminal penalties. The Court explained:

> "To impose upon a party interested in the burden of obtaining a judicial decision of such a question . . . only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these Acts, is, in effect, to close up all approaches to the Courts, and thus prevent any hearing upon the questions of whether the rates as provided by the Acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the Act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation."

Id. at 148.

The Complaint alleges that the determination of whether a particular amusement device contains the necessary elements of skill over chance involves a specialized factual determination that can only be made after expert investigation and analysis. Moreover, Respondents allege in the Complaint that Petitioners are discriminatorily enforcing S.C. Code § 12-21-2710 by allowing devices that have been specifically ruled illegal in prior judicial rulings to

operate in video arcades catering to young children where young children can redeem coupons for merchandise while seizing equipment of Respondents that have never been subject to any judicial ruling. Respondents allege that this discriminatory enforcement is designed to restrict Respondents' participation in the political process in South Carolina in violation of Respondents' constitutional rights.

The District Court relied almost exclusively upon the Fourth Circuit decision in *Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999) in reaching its decision to abstain under *Burford*. There, the Fourth Circuit vacated an injunction entered by the District Court that sought to enforce the State's regulatory scheme over video gambling. The Fourth Circuit also remanded the case with directions to dismiss or remand to state court all claims of equitable relief and to stay proceedings on claims of damages pending the resolution by the state courts of disputed questions of state law.

In *Johnson v. Collins*, plaintiff's federal RICO claims were premised upon violations of state law. Moreover, the state law questions were unresolved and very significant to the overall regulation of video gaming in South Carolina at the time. For this reason, the Court of Appeals held that the District Court erred by answering disputed questions of state gaming law. The court stated that, "The District Court contravened *Burford* principles by attempting to answer disputed questions of state gaming law that so powerfully impacts the welfare of South Carolina

citizens." The Court further explained that "Issues of state law and state public policy have dominated this action from day one. Most notably, the parties have contested the meaning of the $125 payout limit . . . when the District Court interpreted this provision, it was necessarily trying to predict how the South Carolina Supreme Court would decide the question. . . . But because this question involved a most basic problem of South Carolina public policy, the state court system should have been permitted the first opportunity to resolve it." *Id.* at 720.

Respondents' claims in the case at bar do not involve disputed issues or interpretation of State law. Rather, Plaintiffs' claims are based solely upon a constitutional challenge to the State of South Carolina's settled application of S.C. Code §§ 12-21-2710 and 12-21-2712.

Helton v. Hunt, 330 F.3d 242 (4th Cir. 2003) rather than *Johnson v. Collins* is instructive. In *Helton v. Hunt*, the Fourth Circuit Court of Appeals held that portions of the North Carolina gaming statutes which authorized law enforcement officers to seize and destroy video game machines without any judicial oversight violated due process. In the District Court, defendants moved to dismiss the case pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. The District Court denied the Motion to Dismiss stating:

> "The Declaratory Judgment Act has been consistently utilized to determine the constitutionality of criminal statutes . . . In order

> to establish standing – and thus subject matter jurisdiction – under the Declaratory Judgment Act, the plaintiff must show (1) a case of actual controversy, and (2) an independent source of federal jurisdiction. . . . Here, the amended complaint alleges that the application of the statutes at issue would violate the United States Constitution which satisfies the second prong of this test. While in the case of an ongoing, state-court prosecution, federal courts will abstain from granting declaratory relief, nothing will prevent such action in the absence of an extant state court proceeding. *Younger v. Harris*, 401 U.S. 37 (1971)."

Helton v. Good, 330 F.Supp.2d 597 (W.D.N.C. 2002).

II. *BURFORD* ABSTENTIA IS THE EXCEPTION, NOT THE RULE, AND SHOULD ONLY BE APPLIED WHEN THE FEDERAL COURT'S RULING WILL INTERFERE WITH PROCEEDINGS OF STATE ADMINISTRATIVE AGENCIES OR WHERE UNCONSTRUCTED STATUTES CAN BE INTERPRETED TO AVOID THE CONSTITUTIONAL CHALLENGE AND NEITHER SITUATION IS INVOLVED IN THIS ACTION

Federal courts have a strict duty to exercise the jurisdiction that is conferred upon it by Congress. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996), *citing Colorado River Water Conservation Dist. v. United States*, 424

U.S. 800, 821, 96 S.Ct. 1236, 1248, 47 L.Ed.2d 483 (1976). As stated in *New Orleans Public Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 358-59, 109 S.Ct. 2506, 2513, 105 L.Ed.2d 298 (1989):

> "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). "'[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.'" *Chicot County v. Sherwood,* 148 U.S. 529, 534, 13 S.Ct. 695, 697, 37 L.Ed. 546 (1893) (citations omitted). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas. Co.,* 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L.Ed. 382 (1909) (citations omitted). *Id.* Thus, "'[a]bstention from the exercise of federal jurisdiction is the exception, not *773 the rule.'" *Wilson v. Valley Electric Membership Corp.,* 8 F.3d 311 (5th Cir. 1993) *citing Colorado River,* 424 U.S. at 813, 96 S.Ct. at 1244.

The *Burford* doctrine is one of a limited number of abstention doctrines that have been enunciated by

the Supreme Court. In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) Sun Oil Co. challenged a drilling permit issued to Burford by the Texas Railroad Commission. Sun Oil contended that the order violated state law and the federal Due Process Clause. The Supreme Court held that the district court should have abstained based on "the comprehensive nature of the state regulatory scheme, the large interest of the state in regulating and conserving its oil and gas resources, and the need for a unified approach to granting permits by a single adjudicatory body." *Sierra Club v. City of San Antonio,* 112 F.3d 789, 793 (5th Cir. 1997) *citing Burford,* at 327-34, 63 S.Ct. at 1104-08.

In *New Orleans Public Service Inc. v. City of New Orleans,* the Supreme Court distilled the principle of the *Burford* doctrine, by stating: "Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceeding or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Service, Inc.,* at 362, 109 S.Ct. at 2515.

The present case does not involve a state law claim, nor is there an assertion that the federal

claims are "in any way entangled in a skein of state-law that must be untangled before the federal case can proceed." *Id.*; *See also*, *Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999) (Issues of State law and State public policy have dominated this action from day one. Most notably, the parties have contested the meaning of the $125 payout limit . . . when the District Court interpreted this provision, it was necessarily trying to predict how the South Carolina Supreme Court would decide the question). Rather, Respondents' claims are based solely upon a constitutional challenge to the State of South Carolina's settled application of S.C. Code §§ 12-21-2710 and 12-21-2712. Specifically, Respondents allege that they are being denied their rights to Due Process and Equal Protection because the statutory scheme prevents Respondents from obtaining a determination regarding the legality of a particular amusement device except upon the condition that if unsuccessful he must suffer imprisonment, forfeit property and/or pay a fine. Petitioners have not and cannot contest that there is no administrative or regulatory process by which a video game machine or other amusement device can be approved and that the Respondents only avenue for such a determination is through a civil forfeiture proceeding where Respondents risk loss of property and are subjected to criminal sanctions. As a result, the State of South Carolina, similar to the Minnesota's railway rate legislation challenged in *Ex Parte Young*, 209 U.S. 123 (1908), has closed up all approaches to the Courts.

In addition, exercise of jurisdiction in this case will not interfere with any proceedings or orders of state administrative agencies and will not disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern. First, there are no administrative orders or regulations currently governing the operation of video game machines, other than a requirement that a machine owner pay a license fee. *See* S.C. Code § 12-21-2720. Following the Fourth Circuit's decision in *Johnson v. Collins*, on July 1, 2000 the State of South Carolina repealed all laws authorizing and regulating cash payouts on video poker machines. *See*, *Joytime Distributors v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999). Moreover, the State laws that define whether a particular video game is lawful do not provide an adequate state court review. The only review available is from a magistrate's order destroying an alleged illegal video game or a criminal conviction for possessing an alleged illegal video game. As established by *Ex Parte Young*, this is not an adequate review.

The Fourth Circuit decisions upholding or requiring abstention under *Burford* uniformly defer to an administrative or regulatory process, which is totally lacking in the present case. For example, in *First Penn-Pacific Life Insurance v. Evans*, 304 F.3d 345 (4th Cir. 2002) the Court concluded that the lower court correctly abstained from exercising jurisdiction in order to avoid interfering with State receivership proceedings. In *Brandenburg v. Seidel*, 859 F.2d 1179

(4th Cir. 1998), the Court also upheld *Burford* abstention where there were ongoing state receivership proceedings. In *Johnson v. Collins*, as stated previously, the Court relied upon the existence of a detailed regulatory process administered by the South Carolina Department of Revenue that was tasked with enforcing a $125.00 payout limit, the number of videogame machines at a single place or premise advertising restrictions and other detailed regulations. Moreover, in *Fisher v. King*, 232 F.3d 391 (4th Cir. 2000), the Court ruled that *Burford* abstentia is not appropriate unless the claim involves an unconstructed State statute that is susceptible of a construction by the State judiciary which might avoid, in whole or in part, the necessity for federal constitutional adjudication, citing *Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976).

Here, there is no such administrative or regulatory process to which this Court should defer. Further, there are no un-constructed State statutes at issue. Rather the entire challenge is to settled procedure denying Respondents any opportunity to have either a judicial or quasi-judicial ruling upon the legality of any proposed video game machine except upon risking the loss of property and personal liberty.

CONCLUSION

The Fourth Circuit correctly distinguished Respondents claims from those seeking a federal ruling that a particular video gambling device is legal under a State's law regulating such devices. The Fourth Circuit's opinion further exposes Petitioner's mischaracterization of Respondents claims, mischaracterizations which Petitioners continue to assert before this Court. Judge Motz well-reasoned opinion correctly applies *Burford* abstention doctrine and concludes that Respondents claims fall well outside the narrow category of cases to which *Burford* abstention may apply.

Respectfully submitted,

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